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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-214

CALNETICS CORPORATION and MEIER-LINE, INC.,
Petitioners,

vs.

VOLKSWAGEN OF AMERICA, INC. and VOLKSWAGEN PRODUCTS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

HERBERT RUBIN
CECELIA H. GOETZ
of
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680

PHILIP ELMAN
WILLIAM R. WEISSMAN
MARK SCHATTNER
of
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 296-2121
Attorneys for Respondents, Volkswagen of America, Inc. and Volkswagen Products Corp.

Of Counsel:

HARRY B. SWERDLOW
ALLAN ALBALA
of
SWERDLOW, GLIKBARG & SHIMER, P.C.
9601 Wilshire Boulevard
Beverly Hills, California 90210
(213) 274-8045

September 10, 1976

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

This brief is submitted by respondents Volkswagen of America, Inc. ("VW" or "VWoA") and Volkswagen Products Corporation ("VPC" or "Subsidiary") in opposition to the Petition for a Writ of Certiorari filed herein by petitioners (referred to collectively as "Calnetics").

Opinions Below

During the course of this proceeding, in which five judgments were entered disposing of the various claims and counterclaims, the District Court signed three sets of

"Findings of Fact and Conclusions of Law," one of which is reported at 348 F. Supp. 623 (C.D. Cal. 1972), and wrote two opinions, reported at 348 F.Supp. 606 (C.D. Cal. 1972) and at 353 F.Supp. 1219 (C.D. Cal. 1973). Petitioners have reproduced as Appendix "A" and "B" to their petition only the two District Court opinions specifically dealing with their claims under Section 7 of the Clayton Act (P. App. 1-48).[1] The opinion of the Court of Appeals for the Ninth Circuit (Appendix "C" to the Petition) is reported at 532 F.2d 674 (9th Cir. 1976).

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

In this private antitrust suit, the Court of Appeals, finding numerous serious errors of law, set aside the equitable decree in Calnetics' favor on its claims under Section 7 of the Clayton Act (15 U.S.C. § 18), and ordered a new trial on the merits of all its antitrust claims. The petition for certiorari does not challenge the correctness of such decision. Instead, Calnetics asks the Court to review the following subsidiary questions relating to equitable relief which, obviously, are academic and will not arise unless and until Calnetics should succeed on the remand in establishing not only the merits of its claims but also, *inter alia*, that it is faced with threatened loss or damage, as required by Section 16 of the Clayton Act, a possibility that appears

[1] "P.App." refers to Petitioners' Appendix; "Pet." refers to the Petition; "R." refers to the record on appeal; "R.App." refers to the appendices annexed hereto; "Tr." to the transcript of the trial on a claim of violation of Section 7 of the Clayton Act.

remote since Calnetics has left the business of manufacturing automobile air-conditioners:

1. Whether divestiture is available in private injunction suits under Section 16 of the Clayton Act, 15 U.S.C. § 26.

2. Whether attorneys' fees may be awarded to successful plaintiffs in such suits.

Statutes Involved

The statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

A. Introductory Statement

This action brought by Calnetics, an unsuccessful manufacturer of automobile air-conditioners, was based on various alleged violations of the antitrust laws by VW, the United States importer of Volkswagen vehicles, most particularly the acquisition of its air-conditioning supplier in September, 1969. A plenary trial was had only with respect to plaintiff's Section 7 claim. In brief, the reasons for Calnetics' demise are that it enjoyed a short period of forced, unnatural growth by virtue of commercial bribery; its products were defective and dangerous, alienating owners of new Volkswagen vehicles, and leading many Volkswagen dealers to refuse to handle them; and after operating consistently at a loss, Calnetics was left in 1970 a bankrupt shell, unable to compete in the marketplace. Such facts are to be found in the papers underlying the various summary judgments with which the trial court disposed of the bulk of this litigation. The Section 7 trial

record showed that VW's challenged acquisition of a bankrupt company did no more than replace a "captive" supplier with a wholly-owned subsidiary, effecting no other change in the marketplace.

Within the limited compass appropriate to this opposition, it is impossible to set out the full facts. Necessarily, the statement which appears below is only a skeletal outline of a complex factual record.

B. The Basic Facts

The claims and counterclaims involved in this proceeding all have their genesis in the shifting purchasing decisions made by Volkswagen Pacific, Inc. ("VPI" or "Distributor"). VPI, during the relevant period, was one of fourteen wholesale distributors franchised by VW to buy and resell Volkswagen vehicles. Some of these distributors were VW subsidiaries, and some, like VPI at that time, were wholly-independent enterprises. VPI did business in southern California, southern Nevada, Arizona, and Hawaii. (P. App. 2.)

Since at least 1963, VW, in order to make Volkswagen vehicles competitive with factory air-conditioned automobiles, has been buying hang-on air-conditioners (*i.e.*, air-conditioners that can be installed in vehicles after they have left the assembly line) from a Texas manufacturer, Delanair Engineering Company, Inc. ("Delanair", "VPC", or "Subsidiary"). When the relationship began, Delanair was a subsidiary of a large British conglomerate. As automobile air-conditioning became increasingly important to the sale of new vehicles, VW involved itself increasingly with Delanair, particularly in designing, selling, and servicing the Delanair product. By 1969, Delanair, which originally had

manufactured air-conditioners for a broad line of vehicles, had become, in effect, a "captive" supplier to VW for which alone it manufactured units for Volkswagen vehicles, while VW similarly confined its purchases to the Delanair product. (P. App. 7-8.)

That summer, VW's sales of Delanair air-conditioners dropped precipitously and Delanair faced financial disaster. By September 1969, Delanair's situation was desperate; it was virtually shut down and unable to meet its debts as they fell due. VW, concerned that Delanair's collapse would leave VW without warranty and service backup for the large number of Delanair units already installed in VW automobiles, and without a supplier capable of manufacturing an essential accessory in sufficient quantity for the model year just then beginning, agreed to purchase Delanair and undertook its rehabilitation. The acquisition was consummated on September 26, 1969, and Delanair became Volkswagen Products Corporation. (P. App. 9-11.)

Until October 1968, VPI, like the other Volkswagen distributors, bought virtually all its automobile air-conditioners for Volkswagen vehicles from VW.

Approximately 80 percent of all air-conditioners sold by franchised Volkswagen distributors and dealers were manufactured by Delanair and distributed by VW. That year, however, Calnetics replaced VW as a supplier of air-conditioners to VPI. The market served by VPI accounts for a large share of all air-conditioners for Volkswagen automobiles sold in the United States.[2]

VPI began buying Calnetics air-conditioners in reliance on the recommendation of its service manager, Rolf C.

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[2] According to undisputed figures in the record, approximately 15 percent of all such air-conditioners were sold in 1968 in the territory in which VPI did business.

Christiansen, who, unknown to VW or to his superiors at VPI, received a 3 percent kickback by Calnetics on all sales made to VPI. VPI's decision meant that VW's Delanair units were excluded from the area served by VPI.[3]

Calnetics had never previously engaged in the large-scale manufacture of automobile air-conditioners, and its products, sold under the trade name "Meier-Line," proved to be seriously defective and dangerous, leading to at least two fires in the vehicles in which they were installed. In October 1969, after every VPI dealer in Arizona, and several in southern California, refused to accept any more Meier-Line units from VPI, VPI announced that it would handle air-conditioner units manufactured by DPD,[4] another air-conditioner manufacturer from whom its dealers had theretofore been buying directly, as well as the Meier-Line unit.[5] Shortly thereafter, following a sales visit from VW's Parts Vice President, on October 5, 1969, VPI agreed also to stock and sell VW's products but only after receiving written guarantees that VW would take back any units that could not be sold or were unsatisfactory. However, not until April 1970 did VPI purchase any significant quantities from VW's new subsidiary. Its principal supplier that year was DPD.[6]

[3] When the secret arrangement came to light during discovery in the instant litigation, counterclaims charging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), were filed against Calnetics and others. The District Court summarily dismissed the claims on the grounds that commercial bribery could not be the foundation for Sherman Act claims and that VW would be unable to establish damages. The Court of Appeals affirmed (P. App. 70-72). A petition for certiorari will shortly be filed seeking review by this Court of that judgment.

[4] The Court of Appeals identified this supplier as "Delta" (P. App. 51 n. 3).

[5] At approximately this time, VPI discharged Christiansen from its employ and Calnetics thereupon ceased its "commission" payments to him.

The brief period as VPI's exclusive supplier proved to be financially disastrous for Calnetics. It lost over $300,000 on its automobile air conditioning business in 1969. After persuading VPI on November 14, 1969 to give it one more order for 1,500 units, Calnetics called a meeting of its creditors at which it publicly revealed its insolvent condition. The 1,500-unit order was the last one Calnetics received—or, apparently, sought—from VPI. Neither then, nor later, did Calnetics seek business from any other Volkswagen distributor. After filling VPI's 1,500-unit order, Calnetics limited itself to converting the inventory it had on hand into completed units which it sold directly to dealers—Volkswagen as well as dealers of competing brands—losing nearly $200,000 in 1970. Calnetics ultimately withdrew from the business of manufacturing air-conditioners, and sold its assets to another firm.[7]

C. The Proceedings Below

In September 1970, Calnetics sued VPI, VW, and VPC on the theory that it had lost VPI's business due to a conspiracy in violation of Sections 1 and 2 of the Sherman Act, and, in particular, due to VW's acquisition of its captive supplier which Calnetics claimed violated Section 7 of the Clayton Act. Damages and equitable relief were sought. During the course of discovery, the secret kickback arrangement with Christiansen was discovered, leading to counterclaims by VW, VPC, and VPI.

[6] In 1970, VPI brought 4,225 units from DPD and 2,024 from VW.

[7] We have included as Appendices A, B and C hereto excerpts of sworn deposition testimony and exhibits thereto, taken in another litigation subsequent to the trial below disclosing Calnetics' exit from the market and mooting its claim for equitable relief.

Ultimately, all the various claims and counterclaims, except those asserted by plaintiff under Section 7 of the Clayton Act, were disposed of by the trial court through summary judgment or other procedural shortcuts. Those adverse to Calnetics were all predicated, for one reason or another, on the inability of Calnetics to prove any monetary damages from the alleged antitrust violations. Evidently, for the same reason, the trial court, at the close of Calnetics' case on its Section 7 claims severed for trial, granted defendant's motion to dismiss but solely as to the damage claims.

But while, in the view of the trial court, Calnetics had suffered no damage from the claimed violations of law, this fact was viewed as irrelevant to the power of the court, at the suit of Calnetics, to order divestiture or other equally sweeping relief, just as in a suit brought by the Government. In the opinion of the trial court, a Section 7 plaintiff "need not satisfy the requirement of 'impact' in its classical antitrust definition" (P. App. 27). He "acts somewhat as a Rule 23 class representative." He functions to give the court "the cause for inquiry." The inquiry which then proceeds relates the effect of the acquisition "upon the marketplace." (P. App. 27.)

Sitting as the trier of fact on plaintiffs' equitable claims, the trial judge found that VW's acquisition of its captive supplier had violated Section 7 of the Clayton Act (P. App. 29). Thereafter, the District Court entered a sweeping decree, *inter alia,* mandating divestiture, placing a permanent ceiling on future purchases from the acquired company, and prohibiting VW for seven years from importing air-conditioned vehicles. The court made clear that it considered irrelevant defendants' contention that it was "building the best available air-conditioner for Volkswagen automobiles" (P. App. 35-36).[8]

[8] On appeal, the United States appeared as *amicus curiae* to offer its views on the remedial relief granted by the trial court. Its position was that divestiture is an available remedy under Section 16 of the Clayton Act, but it criticized other aspects of the decree as not adequately supported by findings of fact and as possibly having "a very substantial adverse effect on the automobile market." *Brief for the United States as Amicus Curiae,* p. 20.

Attorneys' fees in the amount of $100,000 were awarded to plaintiff (P.App. 48).

D. The Decision of the Court of Appeals

Except for the summary judgments on the counterclaims against Calnetics, the Court of Appeals reversed the trial court in every respect. The Court of Appeals remanded for a new trial, *in effect nullifying all the proceedings to date, including the adjudication that Section 7 of the Clayton Act had been violated.*[9]

In the view of the appellate court, VPI's reasons for discontinuing purchasing Calnetics' units presented a jury issue. If it were found that "Distributor made an independent, *long-term* business judgment to cease doing business with plaintiff," then such finding "would defeat each and every one of plaintiff's damage claims" not only under Section 7, but under the Sherman Act as well, since these claims "are all interrelated" (P.App. 63 n.13)[10].

[9] That adjudication necessarily fell when the appellate court reversed the directed verdict on damages in favor of VW and remanded plaintiff's damage claims for retrial, since had it been left outstanding, it would have infringed "VW's and Subsidiary's right to a jury trial on the damage claims" (P. App. 76-77).

[10] In fact, almost this finding had earlier been made by the trial court in awarding VPI summary judgment:

> "In view of the difficulties VPI experienced with the Meier-Line unit and the difficulties VPI experienced with plaintiff regarding warranty administration and payment, VPI had no desire [on January 22, 1970] to purchase additional Meier-Line air-conditioners from plaintiff" [R. 1539].

Although the Ninth Circuit deemed it unnecessary, in view of the remand for retrial, to deal with the "challenges to the equitable relief granted by the District Court" (P. App. 78), for the guidance of the court on retrial it noted simply that under the law as laid down in its earlier decision in *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975), "the remedy of divestiture is not available to private plaintiffs in antitrust suits" (P.App. 81).

The Ninth Circuit also reaffirmed, but did not apply to the record before it, the principle that "[i]n evaluating the plaintiff's entitlement to relief under Section 16 the proper focus is on the threat of prospective injury to Calnetics" (P.App. 82). The court set aside the award of Calnetics' attorneys' fees, holding it to be precluded by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

ARGUMENT

I.

This case is not an appropriate vehicle for consideration by this Court of the question of the availability of divestiture in private lawsuits to enforce Section 7 of the Clayton Act.

Calnetics poses the question on which it seeks review to be whether "the private litigant, who, under the law, is to serve as a 'bulwark of antitrust enforcement,' can or cannot obtain 'the most effective of antitrust remedies.'" (Pet. 13). The claim to be a "bulwark of antitrust enforcement" sits most curiously in the mouth of a company which owed its short and unhappy business life to commercial bribery in violation of the antitrust laws (P.App. 88-92).

There are compelling reasons why the Court should deny the petition. The divestiture issue as posed in the present posture of this case is abstract, hypothetical, remote and moot. Calnetics has yet to prove the merits of its claims. Nor has Calnetics ever established the threatened loss or damage to it necessary to invoke Section 16 of the Clayton Act (15 U.S.C. § 26), and since the trial has apparently disabled itself from ever doing so.

A. The divestiture issue is raised prematurely.

Since the entire proceeding, including the adjudication of a Section 7 violation, has been remanded for retrial, the issue of whether divestiture is an available remedy if a violation should be found is not yet, and may never become, ripe for review. *Cf. Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967). The decree of divestiture necessarily fell when the Ninth Circuit vacated the trial court's judgment that the antitrust laws had been violated (P.App. 77). Calnetics has not challenged that portion of the Ninth Circuit's decision in its petition, and hence questions of relief are premature.

Before the issue of divestiture can again arise, two contingencies must occur. First, it must be determined that the acquisition violated Section 7; an adverse "determination will preclude equitable relief" (P.App. 78). Second, the District Court must then make "the further determination that Calnetics is entitled to equitable relief under the judicial standards governing the availability of relief under Section 16 of the Clayton Act" (P.App. 84, 81). Both from the trial record and from facts coming to light thereafter it appears highly unlikely that these conditions will ever be satisfied. Review of a hypothetical and academic issue would be inappropriate.

B. Calnetics' equitable claims are moot.

In December 1972 Calnetics, which had been rendered insolvent by its excursion into the business of manufac-

turing automobile air-conditioners, left that business under circumstances inconsistent with an intention to return, so that its claim for equitable relief is now moot. (*See* R.App. 2a, 7a, *infra*.) Since it has withdrawn from the air-conditioning business, it is not, and cannot be, threatened with loss or damage to it, a prerequisite for any relief under Section 16.[11]

By withdrawing from the air-conditioning business, Calnetics has deprived this tribunal of the power to hear and determine the divestiture issue. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974). But even if Calnetics should escape the constitutional bar, the Court should, nevertheless decline jurisdiction. All the considerations alluded to in *Public Service Comm'n of Utah* v. *Wycoff Co.*, 344 U.S. 237, 243-44 (1952), make it inappropriate to use this case to decide a principle of basic policy:

> "A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particluar case. Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them."

[11] In December 1972, after the hearing on relief had concluded, Calnetics sold all of its assets "tangible or intangible, used in or for the manufacturing, development and sale of automobile air-conditioning units." (R.App. 10a, *infra*). According to the purchaser of these assets, he was advised at the time that Calnetics "would never compete, they would never get back to the manufacture of the compressors or the manufacture of the systems" (R.App. 2a, *infra*). In these circumstances, nothing that takes place in the future with respect to automobile air-conditioners for Volkswagen or Porsche vehicles can threaten Calnetics with any loss or damage.

C. The divestiture issue should not have been reached by the court below.

At the conclusion of the Section 7 proceeding, the record was wholly devoid of any evidence that Calnetics, which was virtually defunct, engaged solely in liquidating its inventory, and seeking no new business from any customer of VW, was facing any "threatened loss or damage" from VW's ownership of its air-conditioning supplier. Indeed, at the end of the case-in-chief, the trial court observed: "For all intents and purposes, [Calnetics], not because of the merger, not because of anti-competition, but because of competition was out of the market in 1970. Total. Absolutely kaputt." (Tr. 1863.) He suggested further that the record permitted the view that Calnetics had "foreclosed themselves" from the new car market "by not being in the market, and by withdrawing themselves from the effective market" (Tr. 1855).

The trial court justified the equitable relief it nevertheless accorded Calnetics by relieving Section 7 plaintiffs of the requirements of Section 16 (P.App. 27). But the Ninth Circuit has reaffirmed that in "evaluating the plaintiff's entitlement to relief under Section 16 the proper focus is on the threat of prospective injury to Calnetics" (P.App. 82).

Thus, even before Calnetics sold out its air-conditioning business in 1972, it was unable to establish any right to equitable relief of any character under Section 16 of the Clayton Act. The issue of divestiture should never have been reached by either court below. Rather, Calnetics' claim for injunctive relief should have been dismissed. It is surely in no posture for review by this Court.

II.

This is neither the case nor the time to reconsider *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

For the same reasons set forth in our discussion of the divestiture issue, consideration by this Court of the availability of attorneys' fees in a private antitrust injunction suit is premature and hypothetical.

In any event, the narrow question of whether, absent a statutory provision for award of attorneys' fees, such fees may be awarded to a litigant acting as a "private attorney general" was settled two terms ago in *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975). Calnetics advances no valid reason for the Court to reconsider the soundness of that decision; indeed, accepting the suggestion of this Court in *Alyeska* that the question of attorneys' fees is one to be decided by Congress (*id.* at 262-64), both branches have passed legislation amending Section 16 of the Clayton Act (15 U.S.C. § 26) to provide for attorneys' fees in private antitrust injunction suits.[12] This further militates against reconsideration of the issue by this Court.

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[12] *See* H.R. 8532, 94th Cong., 2d Sess. § 3(3) (Passed by the House March 18, 1976); H.R. 8532, 94th Cong. 2d Sess. § 303 (Passed by the Senate June 10, 1976). *See also* 122 CONG. REC. H8950 (Daily ed. Aug. 24, 1976); 122 CONG. REC. S14871 (Daily ed. Aug. 27, 1976) (§ 302(3)); 122 CONG. REC. S15420 (Daily ed. Sept. 8, 1976). The House Committee on the Judiciary, which originally reported H.R. 8532, stated that "[t]he issue of attorneys' fees in § 16 injunction cases was apparently disposed of . . . in *Alyeska*. . . ." The report confirms that the Committee was responding to the Court's invitation to Congress in *Alyeska* to enact specific legislation where it intends that attorneys' fees be awarded. H.R. Rep. No. 94-499, 94th Cong., 1st Sess. at 19 (1975).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HERBERT RUBIN
CECELIA H. GOETZ
of
HERZFELD & RUBIN, P.C.
40 Wall Street
New York, New York 10005
(212) 344-0680

PHILIP ELMAN
WILLIAM R. WEISSMAN
MARK SCHATTNER
of
WALD, HARKRADER & ROSS
1320 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 296-2121
Attorneys for Respondents, Volkswagen of America, Inc. and Volkswagen Products Corp.

Of Counsel:

HARRY B. SWERDLOW
ALLAN ALBALA
of
SWERDLOW, GLIKBARG & SHIMER, P.C.
9601 Wilshire Boulevard
Beverly Hills, California 90210
(213) 274-8045

September 10, 1976

APPENDICES

APPENDIX A

Excerpts from the Deposition of John A. Caves July 11, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

Civil Action No. 72-H-1429

HEATRANSFER CORPORATION,

Plaintiff,

vs.

VOLKSWAGENWERK, A.G.,

Defendants.

Deposition of JOHN A. CAVES, taken on behalf of Defendants, at 1801 Avenue of the Stars, Suite 510, Los Angeles, California, commencing at 2:55 P.M., Thursday, July 11, 1974, before V. Allison Webster, C.S.R., Notary Public pursuant to notice and subpoena.

APPEARANCES OF COUNSEL:

For Plaintiff:
BAKER & BOTTS
By: JOHN L. JEFFERS, JR., ESQ.
One Shell Plaza
Houston, Texas 77002

For Defendant:
PAUL S. FERBER, ESQ.
1801 Avenue of the Stars, Suite 510
Los Angeles, California 90067

Excerpts from the Deposition of John A. Caves
July 11, 1974

(p. 3)

JOHN A. CAVES, having been duly sworn, testified as follows:

Examination by Mr. Ferber:

Q. Would you state your name for the record, please. A. John A. Caves.

Q. Are you employed by Climax Air Conditioning Company? A. Climax Conditioning Corporation.

Q. That is the proper name? A. Yes.

Q. What position do you hold there? A. President.

Q. Are you a shareholder? A. Yes.

Q. Who are the other shareholders of Climax Conditioning Corporation? A. Just me.

(p. 25)

By Mr. Ferber

Q. When you were negotiating with people from Calnetics, did you ever discuss with them whether Calnetics would come into the market again and compete with you in the manufacture of the compressor or the manufacture of systems using the compressor?

• • •

A. I don't believe there was ever anything said about Calnetics. Now does that include Meier-Line when you say that?

Q. Yes, either of the two, because the corporate structures have been moved around a little. A. Well, legally, or just by my own fuzzy recollection, they had always said that they would never compete, they would never get back into the manufacture of the compressors or the manufacture of the systems.

Excerpts from the Deposition of John A. Caves
July 11, 1974

Q. Who did you negotiate with? A. Fred Edward and Dean Olson.

Q. Do you remember whether it was Fred Edward or Dean Olson who told you—I guess it was an inducement for you to enter into the transaction—that they weren't going to compete with you? A. I can't recall which one. It could have been either one or both.

Q. But it was at least one of the two?

(p. 26)

A. Yes. I beileve it was.

APPENDIX B

Excerpts from the Deposition of Fred E. Edward July 11, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil Action No. 72-H-1429

—o—

HEATRANSFER CORPORATION,

Plaintiff,

vs.

VOLKSWAGENWERK, A.G.,

Defendants.

—o—

Deposition of FRED E. EDWARD, taken by Defendants at 1801 Avenue of the Stars, Suite 510, Los Angeles, California 90067, commencing at 10:25 A.M., Thursday. July 11, 1974, before V. Allison Webster, CSR, Notary Public, pursuant to Notice and Subpoena.

APPEARANCES OF COUNSEL:

For Plaintiff:
BAKER & BOTTS
By: JOHN L. JEFFERS, JR., ESQ.
One Shell Plaza
Houston, Texas 77002

For Defendant:
PAUL S. FERBER, ESQ.
1801 Avenue of the Stars, Suite 510
Los Angeles, California 90067

Excerpts from the Deposition of Fred E. Edward
July 11, 1974

For Witness FRED EDWARD:
BLECHER, COLLINS & HOECKER
By: GARY W. HOECKER, ESQ.
612 South Flower Street
Los Angeles, California 90017

(p. 3)

FRED E. EDWARD, having been duly sworn, testified as follows:

Examination by Mr. Ferber:

Q. Would you please state your name for the record. A. Fred Edward.

Q. Mr. Edward, who are you employed by? A. I am president of Calnetics Corporation.

Q. Are you also a director of Calnetics? A. Yes.

Q. Are you a shareholder? A. Yes.

(p. 5)

(By Mr. Ferber:)

Q. Has Meier-Line remained as a separate corporation? A. It is a division.

Q. It is a division?

(p. 6)

A. Yes.

Q. But it is not doing any business? A. No.

Q. When did it stop doing business? A. 19.... At the transaction with John Caves, which would be December 31 of '72.

(p. 8)

(By Mr. Ferber:)

Q. Can you identify the company we have been referring to as "Climax"? Who is that? A. Climax is the cor-

Excerpts from the Deposition of Fred E. Edward
July 11, 1974

poration, the shareholder, I only know of one shareholder, and that is John Caves. Who the others are, I don't know.

(p. 9)

Q. Is that a corporation with which Meier-Line had a transaction? A. Yes.

Q. When did that transaction take place? A. In December of '72, effective in January '73.

* * *

(By Mr. Ferber:)

Q. Mr. Edward, can you identify the document which your counsel put before you? A. Yes.

Q. What is it? A. It is a sale agreement for the assets of the air conditioning company.

Q. Being basically Meier-Line? A. Yes.

* * *

(p. 10)

Mr. Ferber: I would like to have the reporter mark as Defendant's Edward Exhibit 1, a five-page document entitled "Agreement for Sale of Assets," and on the last page purporting to be signed by Fred Edward as president, and a conformed signature of John A. Caves on behalf of Climax.

(The document referred to was marked by the notary public as Defendant's Edward Exhibit 1 for identification, a copy of which is attached hereto.)

Mr. Ferber: Q. Mr. Edward, I would like to show you Exhibit 1 and have you confirm that this is the document that we have been talking about as the Agreement for Sale regarding the Meier-Line Corporation assets. Is that your signature in Page 5? A. Yes, it is.

Q. As a result of this transaction, did Meier-Line Corporation simply go out of business as a manufacturer of air conditioners? A. Temporarily, yes.

Excerpts from the Deposition of Fred E. Edward
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Q. What present plans does it have to resume business, if any? A. Well, we have plans, Paul, depending on the results of our case and deposition thereof. And we will take a good hard look at it.

Q. When you say "take a good hard look at it," what I would like to do is get at right now what present plans

(p. 11)

you have right now, if any, to go back into business, as opposed to, "We will look at the operation a year or two years down the line and decide whether it is worth going into." A. If the results are favorable to Calnetics, then we will go back into it.

Mr. Jeffers: The results in the litigation that is pending out here.

Mr. Ferber: Q. That is a definite policy decision that has been made? A. We will analyze it, yes, and if the conditions are correct—

Q. Every time I think I get it, you throw something else in.

Mr. Hoecker: Are you talking about industry conditions?

Mr. Ferber: Right.

Q. It is not just the question of winning the lawsuit? A. No.

Q. It is whenever the lawsuit is over you want to look at the market and determine if, as a businessman, the market is desirable? A. That is correct.

(p. 14)

MR. FERBER: I would like to have marked as Defendant's Edward Exhibit 2 —

* * *

Excerpts from the Deposition of Fred E. Edward
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MR. FERBER: As Defendant's Edward Exhibit 2, a one-page, what appears to be a letter agreement between Calnetics Corporation and Climax Corporation, which bears no date and is re: Modification of Calnetics-Climax Agreement, and purports to be signed by Fred Edward on behalf of Calnetics Corporation and John Caves on behalf of Climax Corporation.

(The document referred to was marked by the notary public as Defendant's Edward Exhibit 2 for identification,

(p. 15)

a copy of which is attached hereto.)

MR. FERBER: Q. Mr. Edward, can you identify your signature on Exhibit 2? A. Yes.

Q. Is that a document that was executed between Calnetics and Climax to modify Exhibit 1? A. Yes.

(p. 34)

MR. FERBER: Let me last have marked as Defendant's Edward Exhibit 13 a two-page document headed "Amendment to Agreement for sale of assets." And this again relates to the Calnetics Corporation-Climax Corporation transaction, and apparently is signed on August 7, 1973, by Fred Edward on behalf of Calnetics Corporation and by John A. Caves on behalf of Climax Conditioning Corporation.

(The document referred to was marked by the notary public as Defendant's Edward Exhibit 13 for identification, a copy of which is attached hereto.)

(p. 35)

MR. FERBER: Q. Mr. Edward, I would like you to look at that document and see if you can identify your signature on the second page. A. Yes.

Q. Is that an accurate copy of an amendment to the agreement which has been marked as Exhibit 1? A. Yes.

APPENDIX C

Exhibits to the Deposition of Fred E. Edward
July 11, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil Action No. 72-H-1429

———o———

HEATRANSFER CORPORATION,

Plaintiff,

vs.

VOLKSWAGENWERK, A.G.,

Defendant.

———o———

EXHIBIT 1

Agreement for Sale of Assets

THIS AGREEMENT is made on December 31, 1972, between Calnetics Corporation, a California corporation, hereafter called SELLER and CLIMAX CONDITIONING CORPORATION, a California corporation, hereafter called BUYER, in reference to the following facts:

A. Seller is engaged in the manufacture and sale of automotive air conditioning units for small automobiles.

B. Buyer desires to purchase from seller and seller desires to sell to buyer the assets of the Meirline, Inc., a division of Calnetics Corporation, as are hereafter set forth.

THEREFORE, the parties agree as follows:

1. Buyer hereby purchases from seller and seller hereby sells, transfers and assigns to buyer the following:

A. All of the finished product, raw materials, work in process, supplies, and inventory of any kind and description and wherever located as more particularly set forth in Exhibit A attached.

B. All installations, fixtures, improvements, machinery, tools, dies, appliances, motor vehicles, and equipment of every kind and description, as more particularly set forth on Exhibit B attached.

C. All trade names, trade marks, copyrights, patents, patent licenses, applications for patents, and right to inventions of seller, including all rights set forth in the exclusive World License dated July 31, 1968, the agreement referring thereto dated July 31, 1968, and the modification agreement relating thereto dated January 16, 1973, all of which are marked Exhibit "C" and attached hereto.

D. All other property and assets of seller of whatever nature and wherever situated, including, but not limited to, books and records, prints, engineering data, and all other assets tangible or intangible, used in or for the manufacturing, development and sales of automobile air conditioning units.

E. Contracts, prepaid items, and deposits with municipalities or public utilities.

F. All of its rights, title and interest in and to any claim for equitable relief or any other benefit relating to the action pending in the United States District Court for the

Central District of California, entitled Calnetics Corp. and Meirline Corp. versus Volkswagen of America, Inc., Volkswagen Pacific Inc. and Volkswagen Products Corp. No. 70-2185-R, with respect to Buyers manufacturing, distributing and sales of air conditioning units for Volkswagen automobiles to Volkswagen Distributors. Providing however, that seller shall relate to money damages with respect to said pending litigation.

2. Seller shall sublease to buyer the premises located at 17939 East Rowland, City of Industry, California, and shall obtain the consent of the owner of said premises thereto.

3. In consideration for the assets sold herein, buyer shall pay, transfer, or assign to seller the following:

A. $1,000.00 in cash, payable upon execution of this agreement.

B. $14,000.00 payable on or before July 1, 1973, at no interest.

C. 240,000 shares of common stock of Douglass Industries, Inc., formerly known as C.E.C. Corporation, presently in the name of John A. Caves.

4. Seller shall indemnify and hold buyer harmless against and in respect of, all liabilities of seller of any nature, whether accrued, absolute or contingent, or otherwise existing at January 1, 1973. In this connection seller shall be responsible for any products sold prior to January 1, 1973, and returned to buyer for credit, provided that buyer shall provide a warranty with respect to products sold by seller prior to January 1, 1973, only to the extent that a claim in connection with a defective product may be satisfied from the inventory and supplies purchased herein and only to the

extent that any such claims do not exceed an aggregate value of $5,000.00 of such inventory and supplies, which shall be valued at seller's cost.

5. Seller hereby represents and warrants as follows:

A. Seller has good and marketable title to all of the properties and assets to be sold, transferred and assigned pursuant to this agreement, subject to no mortgage, pledge, lien, encumbrance, security interest, or charge of any kind or nature.

B. Seller is a corporation, duly organized and existing in good standing under the laws of the State of California and has all requisite power and authority to consummate the transaction contemplated by this agreement, and has by proper corporate proceedings duly authorized the execution and delivery of this agreement and the consummation of all transactions contemplated herein.

C. Seller represents that the acquisition of stock herein is made for its own account and for investment and with no present intention of resale.

D. Seller is not involved in any undisclosed actions, proceedings or investigations, including claims of patent infringement, which might materially or adversely affect the assets sold herein or which in any way would prevent or hamper the transactions contemplated by this agreement.

E. All machinery, equipment, tools and dies are in good working order, and in this connection seller shall replace or make available, all parts or pieces missing from such machinery, equipment, tools or dies.

6. With respect to machinery, tooling, dies, and equipment used by seller prior to January 1, 1973, and owned by

someone other than seller, seller agrees to make such machinery, tools, dies, and equipment available to buyer upon the same terms and conditions that such items were available to seller.

7. Buyer shall pay sales tax, if any, in connection with any of the items purchased herein.

8. For a period of one year from the date hereof, seller shall furnish buyer, without cost to buyer, with compressed air from the premises occupied by seller, adjacent to the premises subleased to buyer and the use of one forklift in the possession of seller.

9. Seller shall pay the finder's fee due in connection with this Agreement For Sale of Assets to O. Wayne Carrico. Said fee shall consist of 13,000 shares of Calnetics Corporation common stock and the sum of $1,000.00 to be paid out of the proceeds of the Promissory Note referred to in paragraph 3-B above.

10. This agreement shall be binding upon and inure to the benefit of and be enforceable by the respective successors and assigns of the parties hereto.

11. This agreement is executed, delivered, and intended to be performed in the State of California and shall be construed and enforced in accordance with and shall be governed by the laws of such state.

12. All notices, requests, consents and other communications hereunder shall be in writing and delivered and mailed:

A. If to the seller, 5445 Century Boulevard, Lynwood, California.

B. If to the buyer, 5636 Shull Street, Bell Gardens, California, ATTN: John A. Caves.

13. In the event legal action must be commenced by either party to enforce the provisions of this agreement, the party prevailing in such litigation shall be entitled to payment from the other party of an amount equal to reasonable attorney's fees and court costs.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be signed in their respective corporate names by their authorized officers, duly authorized by resolution of their respective boards of directors, on the day and year first above written.

CALNETICS

By: Fred Edward, Pres.

CLIMAX CONDITIONING CORPORATION

By: /s/ John A. Caves

EXHIBIT 2

CALNETICS CORPORATION
5445 East Century Boulevard
Lynwood, California 90262

CLIMAX CONDITIONING CORPORATION
1793-R Rowland
City of Industry, California

Re: Modification of Calnetics—Climax Agreements

Gentlemen:

Reference is made to the Amendment to Agreement for Sale of Assets executed concurrently herewith, effecting in part, a nullification of the assignment of the claim of Calnetics against Volkswagen.

Calnetics further agrees to assign to Climax the benefits of agreements, if any, relating to the manufacture, sale or distribution of air conditioning units that may result from a settlement of the lawsuit between Calnetics and Volkswagen, United States District Court, Central District of California Action No. 70-2185-R.

This letter is intended to be supplementary to said Amendment Agreement.

Very truly yours,

CALNETICS CORPORATION

by FRED EDWARD

CLIMAX CONDITIONING CORPORATION

by John A. Caves, Pres.

EXHIBIT 13

Amendment to Agreement for Sale of Assets

The Agreement for Sale of Assets dated December 31, 1972, between CALNETICS CORPORATION, a California corporation, hereafter called SELLER and CLIMAX CONDITIONING CORPORATION, a California corporation, hereafter called BUYER is hereby amended as follows:

1. Paragraph 1-F on page 2 of said Agreement is hereby deleted and any sale, transfer or assignment made in said paragraph is hereby made null and void.

2. Paragraph 3-B on page 2 of said Agreement is hereby deleted and in place and lieu thereof the following is inserted:

B. BUYER shall execute a promissory note payable to SELLER in the sum of $14,000.00 at no interest payable on or before August 15, 1974. BUYER shall have the option to make such payment either in cash or by transferring to SELLER 10,000 shares of common stock of Douglas Industries Inc., formerly known as C.E.C. Corporation. SELLER understands and agrees that said Douglas Industries Inc., common stock, when duly transferred to SELLER shall discharge the obligation of BUYER in connection with said note regardless of the value of said stock at the time of the transfer. SELLER understands and agrees further that said stock will not be free trading and will bear a restrictive legend. SELLER will execute an appropriate letter at the time of transfer of said stock stating that said stock has been acquired for investment purposes only and not for resale.

The promissory note dated January 18, 1973, executed by BUYER and guaranteed by John A. Caves is hereby made null and void.

Amendment to Agreement for Sale of Assets

3. SELLER shall pay to ROBERT D. MONARCH the sum of $300.00 attorney's fees for preparing this amendment and related documents.

4. The obligation of BUYER pursuant to paragraph 7 on page 4 of said Agreement shall be discharges in full by payment by BUYER of the sum of $558.76 to SELLER.

5. Other than as set forth herein, the provisions of said Agreement dated December 31, 1972, shall remain in full force and effect.

CALNETICS CORPORATION

by FRED EDWARD

Dated Aug 7, 1973

CLIMAX CONDITIONING CORPORATION

by John A. Caves, Pres.

Dated August 7, 1973